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No. 06-7517 3-24-08

IN THE

Supreme Court of the United States

RICHARD IRIZARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* URGING AFFIRMANCE OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether a criminal defendant forfeits his Sixth Amendment right "to be confronted with the witnesses against him" by causing a witness to be unavailable to testify, even if the defendant did not cause the witness's unavailability for the purpose of preventing the witness from testifying.

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IN THE

Supreme Court of the United States

No. 07-6053

DWAYNE GILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 States, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study in the field of

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, and its counsel made such a contribution.

criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. NACDL has frequently appeared before this Court as *amicus curiae*.

NACDL has grave concerns about the California Supreme Court's decision in this case. The decision expands the forfeiture doctrine well beyond its historical roots and thus denies defendants a right the Confrontation Clause, as originally understood, guarantees them. The decision would also greatly expand the use of unreliable *ex parte* testimony, impairing the fairness of criminal trials.

STATEMENT

Dwayne Giles was convicted in California state court of the first-degree murder of his ex-girlfriend, Brenda Avie. J.A. 36. Mr. Giles admitted killing Ms. Avie but claimed he acted in self-defense, testifying that she was a violent woman who had shot another man and had threatened people with knives. *Id.* at 34.

To prove that the killing was premeditated, the State introduced statements Ms. Avie had made to police officers three weeks earlier. In those statements, Ms. Avie accused Mr. Giles of threatening and assaulting her on another occasion. J.A. 35-36. The trial court admitted the statements under a recently enacted hearsay exception for certain "trustworthy" statements of unavailable witnesses. *Id.* at 36 (citing Cal. Evid. Code § 1370).

It is undisputed that the prosecution's introduction of Ms. Avie's statements rendered her a "witness" against Mr. Giles within the meaning of the Confrontation Clause. J.A. 39. The statements were made outside Mr.

Giles' presence, and he had no opportunity to cross-examine her to test the truth of her accusations. Nonetheless, the California Supreme Court held that the statements did not infringe Mr. Giles' right "to be confronted with the witnesses against him," U.S. Const. amend. VI, because he had forfeited that right by killing Ms. Avie—the same offense for which he was on trial. J.A. 32.

The court rejected the argument that forfeiture applies only where a defendant renders a witness unavailable to prevent her from testifying (a requirement that Federal Rule of Evidence 804(b)(6) expressly imposes in federal prosecutions). J.A. 39-57. The court conceded that the forfeiture doctrine was "generally applied" in that context. *Id.* at 45. But it held that forfeiture was not so limited because early cases "did not specifically address the intention of the defendants" and the rule was based on "broad equitable principles." *Id.* at 41 n.3, 52.

SUMMARY OF ARGUMENT

I. The California Supreme Court's decision represents a dramatic departure from the traditional rule governing forfeiture of confrontation rights. At the framing and for at least a century thereafter, forfeiture was a narrow rule of unavailability: If a witness testified against the defendant at his pretrial hearing but the defendant then procured the witness's absence from trial, the pretrial deposition could be admitted. Procurement of a witness's absence was treated like death, illness, or other types of unavailability that justified admitting prior testimony where the defendant had had an earlier opportunity to cross-examine the witness. That rule was extended during the twentieth century to cover any sort of hearsay statement where the defendant procured the declarant's absence for the purpose of preventing him from testifying. The California Supreme Court's rule goes far beyond both the framing-era rule and its modern counter-

part: According to that court, forfeiture applies whenever a defendant merely *wrongfully causes* a potential trial witness's absence—even where the misconduct is wholly unrelated to the declarant's status as a witness.

That new rule lacks any historical support. Early authorities' descriptions of the forfeiture rule make clear that they had only witness-tampering in mind. The context in which the rule arose confirms that focus: The forfeiture rule governed testimony against the defendant at his pretrial hearing, *after* the crime had been committed and prosecution was underway. The reason early authorities did not elaborate on the defendant's intent is not that intent was irrelevant, but that it was a given: Where a witness had already testified against the defendant at his pretrial hearing, the likelihood that a defendant would procure his absence by wrongful conduct for some reason *unrelated to* his status as a witness was so minuscule as to be unworthy of comment.

II. The framing-era law of dying declarations confirms that. If the State's version of forfeiture were historically accurate, courts would have routinely admitted statements of dying witnesses accusing their alleged killers on forfeiture grounds. But such statements were *not* admitted on that ground—only on the wholly different theory that consciousness of impending death made them uniquely reliable. When a witness was not sufficiently aware of his imminent death, moreover, his statements were *excluded*. That result would be wholly inexplicable if the State's theory of forfeiture were correct.

III. The decision below would not only deny defendants constitutional rights that the Sixth Amendment guarantees them, but also vastly expand the use of unreliable *ex parte* testimony in criminal trials. States recognize many different forms of unavailability, all of which will no doubt form the basis for forfeiture claims if this Court affirms the decision below. The state court's deci-

sion would thus vastly expand the use of *ex parte* testimony in criminal trials—precisely the sort of evidence the Confrontation Clause was designed to exclude.

ARGUMENT

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. That provision secures "the right of confrontation [as it existed] at common law, admitting only those exceptions established at the time of the founding." *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004). There is no dispute that the State's introduction of Ms. Avie's testimony rendered Ms. Avie a "witness[] against" Mr. Giles, or that he had no opportunity to "confront[]" her. The case thus turns on whether the testimony falls within a framing-era exception to the rule. The State cannot make that showing.

I. This Case Falls Far Outside the Limited Scope of the Framing-Era Forfeiture Rule

Federal Rule of Evidence 804(b)(6) reflects the modern understanding of forfeiture applied in federal courts: Hearsay is admissible "against a party that has engaged or acquiesced in wrongdoing that *was intended to, and did*, procure the unavailability of the declarant *as a witness*." Fed. R. Evid. 804(b)(6) (emphasis added). The California Supreme Court adopted an even broader conception of the forfeiture doctrine—one that applies to misconduct that causes a witness's absence even if wholly unrelated to his status as a witness. The historical record does not remotely support that rule. To the contrary, the framing-era forfeiture rule was narrower than even the modern *federal* rule that the state court rejected.

At the framing, forfeiture was not a free-standing hearsay exception but a species of unavailability—akin to death or illness—that justified admitting an absent witness's prior cross-examined testimony from a pretrial

hearing. That context makes clear that forfeiture was fundamentally a rule about witness-tampering: Where the crime has already been completed, the prosecution is already underway, and the witness has already accused the defendant in a formal proceeding, there is no realistic likelihood that a defendant would engage in misconduct that renders the witness unavailable for some reason *unrelated to* his status as a witness. The decision below thus extends forfeiture well beyond its historical scope.

A. The Framing-Era Forfeiture Rule Was a Narrow Rule of Unavailability That Applied to Prior Cross-Examined Testimony

1. In England, pretrial proceedings in criminal cases were governed by the so-called Marian statutes, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 Phil. & M., c. 10 (1555). According to those statutes, when witnesses believed someone had committed a felony, they were to bring him before a justice of the peace, who would examine both the witnesses and the suspect to decide whether to bail the suspect or commit him to jail to await trial. The depositions from those "committal" hearings were then sent to the court. The statutes also directed coroners to take depositions of witnesses during their pretrial homicide inquests. *Ibid.*; see generally John H. Langbein, *Prosecuting Crime in the Renaissance* 5-20 (1974); John H. Langbein, *The Origins of Adversary Criminal Trial* 40-47, 273-77 (2003); J.M. Beattie, *Crime and the Courts in England* 268-81 (1986).

Those Marian pretrial depositions were an attractive source of evidence if a witness later became unavailable before trial. England's twelve judges laid down the rules governing their admissibility in 1666. That year, Lord Morley was tried before the House of Lords for killing another man after a quarrel, and the twelve judges advised the House on the admissibility of depositions that had been taken by the coroner. *Lord Morley's Case*, Kel.

53, 84 Eng. Rep. 1079, 6 How. St. Tr. 769 (H.L. 1666). The twelve judges resolved that the depositions were admissible if the witness was "dead or unable to travel," or—as relevant here—"detained by the means or procurement of the prisoner." Kel. at 55, 84 Eng. Rep. at 1080; see also 6 How. St. Tr. at 776-77 ("dead" or "withdrawn by the procurement of the prisoner").

At Lord Morley's trial, the Crown read the coroner's depositions of three witnesses who had died. 6 How. St. Tr. at 776. The court, however, excluded the deposition of a fourth witness who had "run away" after telling his friends that "Lord Morley's Trial was to be shortly but he would not be there." *Id.* at 777. That, the court ruled, was not sufficient to show witness-tampering. *Id.* at 776-77. Consistent with that ruling, when Lord Morley's accomplice was later tried before the King's Bench, the Crown read the depositions of two of the witnesses who had died but apparently did not even offer the deposition of the witness who had merely run away. See *Bromwich's Case*, 1 Lev. 180, 83 Eng. Rep. 358 (K.B. 1666).

For centuries, Lord Morley's case governed the admissibility of Marian depositions—both coroners' depositions and committal depositions before justices of the peace. In 1692, for example, a coroner's deposition was read at the murder trial of Henry Harrison after the Crown showed that a man had "asked [the witness], if he was not an evidence [*i.e.*, witness] against Mr. Harrison," and then "pulled out a piece of money, and offered it [to] him, desiring him to be kind to Mr. Harrison." *Harrison's Case*, 12 How. St. Tr. 833, 851-52 (1692). Four years later, in Fenwick's parliamentary attainder proceedings, one speaker invoked the Marian forfeiture rule to justify admitting a witness's deposition before a justice of the peace, after the defendant's associates apparently bribed the witness to abscond: "[W]here persons do stand upon their lives, accused for crimes, if it appears to

the court that the prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself, so that he cannot give evidence as regularly as they used to do; in that case his information hath been read * * * ." *Fenwick's Case*, 13 How. St. Tr. 537, 594 (H.C. 1696) (Lovel); see also *id.* at 596 (Sloane).[2]

Summarizing the law in 1721, Hawkins wrote: "[T]he Examination of an Informer * * * either before a Coroner upon an Inquisition of Death in pursuance of 1 & 2 *Ph. & M.* 13 or before Justices of Peace in pursuance of 1 & 2 *Ph. & M.* 13 and 2 & 3 *P. & M.* 10 upon a Bailment or Commitment for any Felony, may be given in Evidence at the Trial * * * [if] such Informer is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner * * * ." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429 (1721) (footnotes omitted). Other authorities stated the same rule. See, *e.g.*, 1 Richard Burn, *The Justice of the Peace and Parish Officer* 287-88 (1755). Forfeiture was thus a species of unavailability—akin to death or illness—that justified admitting a witness's pretrial Marian deposition.

2. Marian committal hearings were normally conducted in the prisoner's presence (their purpose, after all, was to determine whether to commit the prisoner to jail). Over the eighteenth century, the view emerged that those hearings offered the prisoner at least a theoretical opportunity to confront and cross-examine his accusers. See generally Kry, *Confrontation Under the Marian*

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[2] The rule was of questionable applicability there. Among other things, Fenwick was charged with treason while the Marian statutes applied only to felonies; those were considered separate categories of offenses. See 13 How. St. Tr. at 602 (Musgrave). The deposition was admitted largely on the ground that the rules of evidence did not bind Parliament. See *id.* at 591-607.

Statutes, 72 Brook. L. Rev. 493 (2007). Lord Morley's case and its progeny were then interpreted to mean that a witness's unavailability justified admitting only *properly taken* committal depositions—*i.e.*, depositions taken in the prisoner's presence, affording an opportunity for cross-examination. That view was widely,[3] although not uniformly,[4] held around the time of the framing, and was consistently followed in early American cases.[5]

Coroners' depositions, by contrast, would not necessarily be taken in the defendant's presence, and English authorities thus had greater difficulty rationalizing their admissibility. See, *e.g.*, Thomas Peake, *A Compendium of the Law of Evidence* 64 n.(m) (3d ed. 1808) (questioning rule but acknowledging that the practice was to admit them "without inquiry whether the party was present or

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[3] See *Fenwick's Case*, 13 How. St. Tr. at 602 (Musgrave); Thomas Wood, *An Institute of the Laws of England* 671 (9th ed. 1763) (*semble*); Julius Goebel, Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York* 634-35 (1944) (1766 protest); *Ayrton* v. *Addington* (1780), in 2 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 1023, 1024-26 (1992); 1 John Morgan, *Essays upon the Law of Evidence, New Trials, Special Verdicts, Trials at Bar, and Repleaders* 431 (1789) (*semble*); *King* v. *Radbourne*, 1 Leach 457, 460-61, 168 Eng. Rep. 330, 332 (1787) (reported 1789/1800); *King* v. *Woodcock*, 1 Leach 500, 501-02, 168 Eng. Rep. 352, 352-53 (1789) (reported 1789); *King* v. *Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (1791) (reported 1800); 4 William Hawkins, *A Treatise of the Pleas of the Crown* 423 (Leach 7th ed. 1795); *King* v. *Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter's note 1797); Thomas Peake, *A Compendium of the Law of Evidence* 40-41 (1801); and other authorities cited in Kry, *supra*, at 495-96 nn.11-12, 512-24, 530-41.

[4] See, *e.g.*, *Eriswell*, 3 T.R. at 713-14, 100 Eng. Rep. at 819 (Buller, J.).

[5] See *State* v. *Webb*, 2 N.C. (1 Hayw.) 103, 104 (Super. 1794); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31-32 (Super. 1798) (Haywood, J.); *Johnston* v. *State*, 10 Tenn. (2 Yer.) 58, 59-60 (1821); and other cases cited in Kry, *supra*, at 496-97 n.13.

not"). One rationale offered was that inquests were such notorious proceedings that everyone was presumed to be aware of them, and thus to have had at least a constructive opportunity to cross-examine. See 2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* *492 (1st Am. ed. 1826) (1824); *King* v. *Eriswell*, 3 T.R. 707, 722, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.).

American authorities, however, refused to indulge that fiction for coroners' depositions and insisted on an actual opportunity for cross-examination. See *State* v. *Campbell*, 30 S.C.L. (1 Rich.) 124, 131-32 (App. L. 1844); *People* v. *Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842); *State* v. *Hill*, 20 S.C.L. (2 Hill) 607, 610 (App. L. 1835); *State* v. *Houser*, 26 Mo. 431, 436 (1858) (*ex parte* coroners' depositions had "never been permitted [as evidence] in this country"). In *Campbell*, for example, the court excluded the coroner's deposition of a deceased witness because the defendant was not present at the inquest. The court first described Lord Morley's case as "quite uncertain, as to the precise point of the absence of the accused at the taking of the depositions." 30 S.C.L. at 127. Apparently not wholly satisfied by that distinction, the court then characterized Lord Morley's case as a "precedent[], not to follow, but to deter," and opined that, "without disrespect to the twelve judges of England," their entire decision was "*obiter dicta*" entitled to no more weight than an earlier state-court decision. *Id.* at 127, 131. Years later, this Court described *Campbell* as if that holding were self-evident. See *Mattox* v. *United States*, 156 U.S. 237, 241 (1895) ("of course it was held to be inadmissible"). The rules of Lord Morley's case thus came to be understood as conditions for admitting prior *cross-examined* testimony.

3. That was no less true in forfeiture cases than in cases involving other types of unavailability. Thus, for example, Archbold wrote that committal depositions

were admissible if the witness was "dead, or unable to travel, or * * * kept away by the means or procurement of the prisoner"—but added that, "to be thus given in evidence, [the depositions] must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness." John Frederick Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* 85 (1822) (citation omitted). Chitty likewise wrote that committal depositions were admissible if the witness was "dead, or not able to travel, or * * * kept away by the means and contrivance of the prisoner"—but must also be "done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 79-81 (1816) (footnotes omitted). Phillipps agreed: Committal depositions were admissible if the witness was "dead, or not able to travel, or * * * kept away by the means and contrivance of the prisoner"—but only if taken "in the presence of the prisoner." S.M. Phillipps, *A Treatise on the Law of Evidence* 277 (2d ed. 1815) (1814) (footnotes omitted); see also *Queen* v. *Scaife*, 17 Q.B. 238, 238-39, 117 Eng. Rep. 1271, 1271 (1851) (committal deposition taken "in the presence of the prisoners" admitted against one defendant on forfeiture grounds).

American courts likewise understood forfeiture as a basis for admitting prior *cross-examined* testimony. In *Drayton* v. *Wells*, 10 S.C.L. (1 Nott & McC.) 409 (Const. Ct. 1819), the court addressed the admissibility of prior trial testimony. It listed being "kept away by the contrivance of the opposite party"—along with death, insanity, and absence overseas—as grounds for admitting the testimony, *provided that* the earlier trial was "between the same parties" and "the point in issue was the same," conditions that ensured an opportunity to cross-examine. *Id.* at 411. In a colonial case, *Rex* v. *Barber*, 1 Root 76

(Conn. Super. 1775), "[o]ne White, who had testified before the justice and before the grand jury against [the defendant] Barber * * * was sent away by one Bullock, a friend of Barber's, and by his instigation; so that he could not be had to testify before the petit jury." *Id.* at 76. The report states that the court admitted "evidence of what [White] had testified before the justice"—but contains no mention of admitting his (*ex parte*) grand jury testimony. *Ibid.*; see also *Williams* v. *State*, 19 Ga. 402, 403 (1856) (committal deposition).

Thus the law stood in 1879 when this Court decided *Reynolds* v. *United States*, 98 U.S. 145 (1879). That case involved a witness's testimony at a former trial for the same offense; the defendant was "present at the time the testimony was given, and had full opportunity of cross-examination." *Id.* at 161. The defendant concealed the witness so she could not be found for the second trial, and the Court admitted her former *cross-examined* testimony on forfeiture grounds. *Id.* at 158-61.

That was still the law when Wigmore wrote decades later. He too listed forfeiture, not as an independent hearsay exception, but as a type of unavailability akin to death or illness that justified admission *provided* "there ha[d] been cross-examination." 3 John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* §§ 1401, 1405, at 111, 118-20 (2d ed. 1923). Thus, for at least a century after the framing, forfeiture was a species of unavailability like death or illness—it justified admitting prior *cross-examined* testimony but was not an independent hearsay exception.

B. The Framing-Era Forfeiture Rule Did Not Apply to Misconduct Unrelated to the Declarant's Status as a Witness

That history shows just how far the California Supreme Court departed from the narrow traditional forfei-

ture rule. Obviously, the statement at issue does not fall within the *framing-era* rule: It is not testimony from a pretrial hearing, former trial, or other occasion where the defendant had an opportunity to cross-examine. This Court, however, need not address the constitutionality of the modern, broader conception of forfeiture embodied in Federal Rule 804(b)(6), because the California Supreme Court's decision extends far beyond even that.

The state court held that forfeiture applies whenever a defendant wrongfully causes a witness's absence, even if the wrongful conduct is unrelated to that person's status as a witness. No historical authority extends forfeiture that far. *Every case* described above that actually admitted a statement on forfeiture grounds (which includes every case cited by *Reynolds* and every early case cited by the court below) involved witness-tampering. See *Harrison's Case*, 12 How. St. Tr. at 851-52 (bribery); *Fenwick's Case*, 13 How. St. Tr. at 550 (bribery); *Reynolds*, 98 U.S. at 159-60 (concealment); *Barber*, 1 Root at 76 (witness "sent away * * * so that he could not be had to testify"); *Scaife*, 17 Q.B. at 238-42, 117 Eng. Rep. at 1271-73 (similar). The court below conceded that forfeiture "generally applied * * * when the defendant intended to, and did, tamper with an actual or potential witness to prevent the witness from cooperating with the authorities or testifying at trial." J.A. 45. Indeed, the oldest case the court cited *outside* that context was from 1997. *Id.* at 46-51.

The court nonetheless claimed that intent was irrelevant because the early authorities "did not specifically address the intention of the defendants." J.A. 41 n.3. That is a strained reading at best. The authorities routinely described the forfeiture rule in terms suggesting that it was limited to witness-tampering. *Reynolds*, for example, referred to witnesses "corruptly kept away." 98 U.S. at 159. *Drayton* referred to witnesses "kept away

by the contrivance of the opposite party." 10 S.C.L. at 411. Treatises referred to witnesses "kept away by the means and contrivance of the prisoner." 1 Chitty, *supra*, at 81; Phillipps, *supra*, at 277. Those formulations are far more naturally read as connoting manipulation of the judicial process, not mere misconduct that causes a witness's absence.

Even if the descriptions were neutral, however, their context makes clear that the authorities had only witness-tampering in mind. The common-law forfeiture rule governed testimony against the defendant at his pretrial committal hearing, the coroner's inquest, or (by the nineteenth century) a former trial for the same offense. See pp. 6-12, *supra*. The rule thus applied to misconduct in contexts where the crime had *already* been completed, the prosecution was *already* underway, and the witness had *already* accused the defendant in a formal proceeding. In those contexts, the possibility that a defendant would engage in misconduct that rendered a witness unavailable for some reason *unrelated to* his status as a witness seems remote.[6]

The far more reasonable explanation for the early sources' failure to elaborate on intent is not that intent was irrelevant, but that it would so clearly exist in the particular pretrial context those sources were expounding that there was no point in addressing it. Intent sim-

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[6] One can imagine situations where a defendant injures a victim, the victim lingers long enough to testify at the pretrial hearing, but the victim then dies or succumbs to incapacity before trial. See, *e.g.*, *Radbourne*, 1 Leach at 458-60, 168 Eng. Rep. at 331-32. In those cases, however, the testimony would be admissible under the "death" or "illness" prongs of Lord Morley's case without regard to forfeiture. See Kel. at 55, 84 Eng. Rep. at 1080. Forfeiture mattered only if the defendant prevented the witness from testifying by means short of killing or injuring him (by threats, bribery, kidnapping, or the like).

ply was not an issue until the forfeiture rule was expanded beyond the Marian pretrial context to statements like those here, made before or shortly after the time of the underlying crime. Only then was it likely that a defendant might render a witness unavailable by misconduct unrelated to his status as a witness.

The California Supreme Court also invoked what it described as the "broad equitable principles" underlying the forfeiture rule. J.A. 52. No doubt, the rule was motivated by equity. But that does not mean a modern court can apply the rule whenever *it* thinks it would be equitable to do so. Procuring a witness's absence to manipulate the trial's truth-seeking function raises different considerations than merely causing a witness to be unavailable. The fact that forfeiture cases historically involved only the former situation shows that the Framers thought equity justified admitting *ex parte* testimony only in that situation. The Confrontation Clause "admit[s] only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. What matters is the traditional *scope* of the equitable forfeiture rule—not the mere fact that is was equitable.

II. The Framing-Era Treatment of Dying Declarations Refutes California's Version of the Forfeiture Rule

The framing-era treatment of dying declarations dispels any doubt that the California Supreme Court's rule is historically insupportable. For centuries, witnesses have made statements accusing their alleged killers after sustaining injuries that eventually resulted in their deaths. If California's version of forfeiture were accurate, those statements would be paradigmatic candidates for application of the forfeiture rule. But the cases failed to invoke any forfeiture rationale for admitting such statements. Moreover, courts adopted a limitation on admissibility that is wholly inconsistent with forfeiture prin-

ciples: They *excluded* the statements unless the witness was aware of his impending demise when he made them.

That result is wholly inconsistent with California's forfeiture rule. California's rule would justify admitting such statements against the alleged killer *whatever* the witness's mental state. The fact that no court or lawyer ever suggested admitting those excluded statements on forfeiture grounds is powerful evidence that the rule did not extend so far.

A. Dying Declarations Were Not Admitted on Forfeiture Grounds, Even When They Fell Squarely Within the California Supreme Court's Version of the Forfeiture Rule

1. By the mid-eighteenth century, it was settled in England that dying declarations were admissible against the defendant in a murder prosecution. See *King* v. *Ely* (1720), in 12 Charles Viner, *A General Abridgment of Law and Equity* 118 (c. 1757); *Rex* v. *Reason & Tranter*, 1 Strange 499, 499-500, 93 Eng. Rep. 659, 659-60, 16 How. St. Tr. 1, 24-38 (K.B. 1722); *Bambridge's Case*, 17 How. St. Tr. 397, 417 (1730). Early American courts followed the same rule. See, *e.g.*, *Respublica* v. *Langcake*, 1 Yeates 415, 416-17 (Pa. 1795); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31 (Super. 1798); *United States* v. *McGurk*, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680). The rationale for that rule, however, was *not* that the defendant had forfeited his confrontation rights by killing the witness. Rather, the specter of impending death was thought to render the statements sufficiently trustworthy to dispense with the ordinary safeguards of oath and cross-examination.

As one framing-era court explained: "[T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this

world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." *King* v. *Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) (reported 1789). Many other authorities identified the same rationale. See, *e.g.*, *King* v. *Drummond*, 1 Leach 337, 337-38, 168 Eng. Rep. 271, 272 (1784) (reported 1789) ("The principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath."); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 619 n.10 (Leach 6th ed. 1787) ("[T]his evidence seems to be admiss[i]ble only upon the idea, that no human motive can at such an awful moment interpose to bias the truth of what is asserted; and therefore the law considers the declarations of a person so dying as equal to the solemnity of an oath." (emphasis omitted)); cf. 1 Geoffrey Gilbert, *The Law of Evidence* 280 (Lofft ed. 1791).[7]

2. Because of that rationale, admissibility depended, not only on whether the witness later died, but on whether he *knew* he was dying. Only then would any motive to fabricate be extinguished. When a witness's apprehension of imminent death was not sufficiently shown, courts excluded his statements.

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[7] Indeed, references to the trustworthiness of dying declarations date as far back as Raleigh's case. See 2 How. St. Tr. 1, 18 (1603) ("*Nem moriturus praesumitur mentiri*"—a dying man never lies); *Trial of Sir Walter Raleigh* (1603), in 1 David Jardine, *Criminal Trials* 400, 435 (1832) ("a dying man is ever presumed to speak truth").

Thus, in *John's Case* (1790), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 357 (1803), a woman accused her husband of assaulting her and later died of her injuries. The husband objected to the statements at his murder trial because "it was not proved that she considered herself at the time as a dying person." *Id.* at 357. The court admitted the statements but referred the case to the twelve judges for review.[8] The judges unanimously ruled that "whether the deceased thought she was dying or not" was to be "decided by the judge before he receives the evidence," and a majority concluded that the statements should have been excluded in that case because "there was no foundation for supposing that the deceased considered herself in any danger at all." *Id.* at 358.

Likewise, in *Welbourn's Case* (1792), in 1 East, *supra*, at 358, a servant told an apothecary a mere hour before dying that another servant had poisoned her. She added, however, that "she believed that she was getting better from the pain ceasing." *Id.* at 359. The twelve judges ruled the statement inadmissible at the fellow servant's murder trial because "it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration." *Id.* at 360.

Other English cases are to the same effect. In *King* v. *Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (1789), a woman told a magistrate before dying that her husband had assaulted her. The judge lamented that it "seem[ed] impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her

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[8] Although there was no formal appellate review in criminal cases, a court faced with a difficult legal issue could stay the execution and refer the case to all twelve judges, much like a modern *sua sponte en banc* process. See Langbein (2003), *supra*, at 212-13 & n.153.

Maker for the truth or falsehood of her assertions." *Id.* at 503, 168 Eng. Rep. at 353-54 (footnote omitted). He left the issue to the jury, instructing them not to consider the statement unless they thought she was "under the apprehension of death." *Id.* at 504, 168 Eng. Rep. at 354.[9]

In *Tinckler's Case* (1781), in 1 East, *supra*, at 354, the defendant objected to the alleged murder victim's dying declarations because "it appeared at the time of her declarations she was better, or thought herself so." *Id.* at 355. The twelve judges did not dispute that statements under such circumstances were inadmissible. But they approved the conviction because the witness had repeated her statements later, after taking a turn for the worse. *Id.* at 355-56.

In *King* v. *Radbourne*, 1 Leach 457, 168 Eng. Rep. 330 (1787) (reported 1789/1800), a woman died after testifying to a justice of the peace that her maid had assaulted her. At the maid's trial, the prosecution argued that the declaration, "by a person who was sensible she was about soon to give an account at the high tribunal of the Almighty, * * * was considered by the law to be made under a sanction more awful and impressive than that of an oath itself." *Id.* at 460-61, 168 Eng. Rep. at 332. The court, however, referred the case to the twelve judges because the witness did "not appear[], at the time she gave [the testimony], to be apprehensive of her approaching dissolution." *Id.* at 462, 168 Eng. Rep. at 333. The judges ruled that the statement (which had been sworn in the defendant's presence) was admissible on another ground—as prior Marian testimony of an unavailable

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[9] According to other reports, however, the judge himself resolved the issue. See *Woodcock's Case* (1789), in Thomas Leach, *Cases in Crown Law* 437, 441-42 (1st ed. 1789); *Trial of William Woodcock*, Old Bailey Sessions Papers, Jan. 14, 1789, at 95, 111-12.

witness. See 1 East, *supra*, at 356; cf. Peake (1801), *supra*, app. 1, at 144 & n.*.

In *King* v. *Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791) (reported 1800), a woman testified to a magistrate that her husband had assaulted her, and died eleven days later. *Id.* at 561-62, 168 Eng. Rep. at 383. At the husband's murder trial, the prosecution counsel conceded that the testimony "was not such an examination of a person under apprehension of immediate death as would, on that principle, authorize the production of it in evidence." *Id.* at 563, 168 Eng. Rep. at 384. The testimony was therefore excluded. See *ibid.*; see also Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 381-87 (1802); 1 East, *supra*, at 353-54; cf. 2 Hawkins (6th ed. 1787), *supra*, at 619 n.10.

3. Early American decisions were comparable. In *State* v. *Moody*, 3 N.C. (2 Hayw.) 31 (Super. 1798), the witness accused the defendant of wounding him; he died several weeks later. The court excluded the statements. It explained that dying declarations must be "of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath." *Id.* at 31. "[I]f at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received; for there is room to apprehend he may be actuated by motives of revenge and an irritated mind, to declare what possibly may not be true." *Ibid.*

In *Lewis* v. *State*, 17 Miss. (9 S. & M.) 115 (1847), the court reversed a murder conviction because the alleged victim's declarations were introduced without sufficient evidence that he was aware of his impending death. Dying declarations, the court explained, were admissible only because "[t]he danger of impending death is regarded as equivalent to the sanction of an oath." *Id.* at

119. Upon being stabbed, the witness had exclaimed "O my people!" but "said nothing else which indicated the apprehension of immediate death." *Id.* at 120. "This showing," the court held, "was not sufficient. It indicated alarm and suffering, but showed no sense of approaching dissolution." *Ibid.*

That same year, in *Nelson* v. *State*, 26 Tenn. (7 Hum.) 542 (1847), the court reversed another murder conviction for similar reasons. The witness there accused the defendant of attacking him but claimed he "'was not badly wounded and was not going to die.'" *Id.* at 543. He was, alas, "very greatly deceived as to his actual condition," and died not an hour later. *Ibid.* The court held the accusation inadmissible because "[i]t is the solemn state of the declarant's mind, in view of approaching death, which is thought to be equivalent to the sanction of an oath," and the declarant's "mind at the very moment of the declaration, according to his own view of the case, was not in the state necessary." *Ibid.*

Other cases reached similar results. Courts excluded the statements of dying witnesses where the witness did not apprehend his imminent death. See *United States* v. *Woods*, 28 F. Cas. 762, 763 (C.C.D.C. 1834) (No. 16,760); *Montgomery* v. *State*, 11 Ohio 424, 425-26 (1842); *Smith* v. *State*, 28 Tenn. (9 Hum.) 9, 17-23 (1848). And they admitted such statements only after concluding that the requisite mental state had been shown. See *United States* v. *Veitch*, 28 F. Cas. 367, 367-68 (C.C.D.C. 1803) (No. 16,614); *King* v. *Commonwealth*, 4 Va. (2 Va. Cas.) 78, 80-81 (Gen. Ct. 1817); *Gibson* v. *Commonwealth*, 4 Va. (2 Va. Cas.) 111, 121 (Gen. Ct. 1817); *State* v. *Poll*, 8 N.C. (1 Hawks) 442, 444 (1821); *State* v. *Ferguson*, 20 S.C.L. (2 Hill) 619, 623-24 (App. L. 1835); *Anthony* v. *State*, 19 Tenn. (Meigs) 265, 277-80 (1838); *McLean* v. *State*, 8 Mo. 153, 157-59 (1843); *Hill* v. *Commonwealth*, 43 Va. (2 Gratt.) 594, 607-11 (Gen. Ct. 1845); *McDaniel* v. *State*, 16

Miss. (8 S. & M.) 401, 415-16 (1847);[10] *Logan* v. *State*, 28 Tenn. (9 Hum.) 24, 25-26 (1848); *McLean* v. *State*, 16 Ala. 672, 674-75 (1849); *People* v. *Wood*, 2 Edm. Sel. Cas. 71, 74-75 (N.Y. Sup. Ct. 1849). Statements of dying witnesses were thus admissible against their accused killers *only* if the witness anticipated his imminent demise.

B. The Dying-Declaration Cases Foreclose California's Rule

1. That history of dying declarations forecloses the California Supreme Court's rule. In dozens of cases, courts either excluded a dead witness's statement accusing his alleged killer because the declarant was not aware of his impending death, or admitted the statement only because the declarant *was* aware of his impending death. Those decisions cannot be reconciled with California's version of the forfeiture rule, which would admit *all* those statements without regard to the declarant's mental state. If any framing-era lawyer or judge shared California's understanding of the rule, surely someone would have tried to invoke it. But the statements were analyzed only as dying declarations; if they failed to qualify on that basis, they were excluded.

If only a handful of cases were at issue, they might be written off as incompetent lawyering—a prosecution counsel overlooking another potentially applicable exception. The sheer number of cases, however, makes that explanation implausible. In many cases, moreover, the prosecution was well represented. In *Radbourne*, for example, the Crown counsel was William Garrow, 1 Leach at 460, 168 Eng. Rep. at 332, "the dominant [criminal] barrister of the day," Langbein (2003), *supra*, at 243, and

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[10] Although *McDaniel* briefly alludes to equitable considerations, 16 Miss. at 416, the court did not treat those considerations as an independent basis for admitting the statements; rather, it made clear that apprehension of imminent death was required, see *id.* at 415-16.

"one of the foremost counsel of the era," Landsman, *The Rise of the Contentious Spirit*, 75 Cornell L. Rev. 497, 551 (1990); see also Beattie, *Scales of Justice*, 9 Law & Hist. Rev. 221, 236-47 (1991). Admissibility in that case was far from clear, see pp. 19-20, *supra*, and if anyone could be expected to raise every conceivably applicable hearsay exception, Garrow surely could.

That omission is all the more striking because California's version of the forfeiture rule would subsume the dying-declaration rule in the mine-run of cases. At least in the nineteenth century, the rule in most jurisdictions was that dying declarations were admissible *only* in homicide prosecutions. See 3 Wigmore, *supra*, §§ 1431-32, at 162-64. But the vast majority of dying declarations in homicide cases would also qualify under California's version of the forfeiture rule. Even if one could imagine exceptions, cf. *Dunn* v. *State*, 2 Ark. 229, 245-47 (1840) (defendant proffered victim's declaration that he was "shot by mistake"), as a practical matter, California's approach to forfeiture would all but swallow the dying-declaration rule.

2. The California Supreme Court made no attempt to explain the historical treatment of dying declarations. Professor Richard Friedman (whose scholarship is largely responsible for the line of cases that includes the decision below) does address the issue in his *amicus* brief. See Br. of Richard D. Friedman as *Amicus Curiae* in Support of Pet. for Cert. 11-14 (Nov. 29, 2007) ("Br."). On this point, however, his arguments are unpersuasive.

Professor Friedman does not dispute that trustworthiness was the "traditional" rationale for admitting dying declarations. Br. 13. He contends, however, that that rationale is "absurd" because dying declarations are not particularly trustworthy. *Id.* at 12. He accordingly suggests that their admissibility is better explained on forfeiture grounds. *Id.* at 11.

That Professor Friedman does not find the framing-era rationale persuasive, however, does not change what that rationale actually was. The Confrontation Clause "admit[s] only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. This Court cannot, consistent with that holding, *reject* the framing-era rationale for admitting dying declarations, replace it with a new rationale, and then rely on that new rationale to broaden the exception so as to admit testimony the original rule would have excluded.[11]

Professor Friedman further argues that the traditional rationale for admitting dying declarations is inconsistent with *Crawford*'s rejection of a reliability-based approach. Br. 12-13. The doctrine that *Crawford* rejected, however, was the amorphous and ahistorical rule that *ex parte* testimony *of any sort* was admissible if sufficiently reliable, see *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)—not the well-defined and eminently historical rule that *dying declarations* are admissible because they were deemed reliable. The "right" the Confrontation Clause categorically protects is the right to confrontation as it existed at common law. Admitting dying declarations is consistent with that right. See *Crawford*, 541 U.S. at 56 n.6. Admitting *other* sorts of "reliable" *ex parte* testimony is not.

Finally, Professor Friedman contends that it would be an "abomination" to exclude statements where the defendant caused the witness's unavailability. Br. 13-14. In case after case, however, framing-era courts did precisely that. See pp. 17-22, *supra*. It is not an "abomination" to

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[11] Ironically, the California Supreme Court has previously held that the dying-declaration exception survives *Crawford* on purely historical grounds, without reference to forfeiture principles. See *People* v. *Monterroso*, 101 P.3d 956, 971-72 (Cal. 2004).

apply the Confrontation Clause as it was written and originally understood. That is simply the rule of law.

The State denied Mr. Giles the right "to be confronted with the witnesses against him" under any conceivable literal meaning of those terms. It justifies doing so on the basis of a purported historical exception, but it cannot cite a single case applying the exception in a remotely similar context, even though dozens of cases presented similar fact patterns and would have been prime candidates for application of the rule. Instead, the State relies on the purported failure of *factually inapposite* forfeiture cases to *exclude* the rule's application here. This Court should insist on a more compelling historical showing before creating an exception to a right the Sixth Amendment expressly provides.

III. The California Supreme Court's Decision Would Significantly Expand the Use of Unreliable *Ex Parte* Testimony in Criminal Trials

The absence of any meaningful historical support for the California Supreme Court's holding is reason enough to reject it. But the court's rule also threatens the fundamental fairness of criminal trials by inviting widespread use of unreliable *ex parte* testimony.

A. The California Supreme Court's Rule Could Be Extended to a Wide Variety of Cases

As the California Supreme Court acknowledged, until recently, courts generally applied the forfeiture rule only to witness-tampering. J.A. 45. Since *Crawford*, however, the doctrine has exploded, as prosecutors—confronted with the demise of *Ohio* v. *Roberts*—have sought new ways to introduce *ex parte* testimony. That trend will only accelerate if this Court affirms the decision below.

1. In homicide cases alone, California's rule would radically expand the use of unreliable *ex parte* testimony. Traditionally, courts admitted a decedent's prior *ex parte*

accusations in a murder prosecution only if they qualified as dying declarations. Thus, *only* statements made immediately before the witness's death would be admitted. California's rule, by contrast, would seem to justify admitting virtually anything the alleged murder victim ever said. In this case, for example, the statement was made three weeks before the shooting. J.A. 32, 35. Other courts have admitted statements even more remote: In *United States* v. *Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005), the court allowed statements the defendant's wife had made *five months* before her death, accusing the defendant of assaulting her on another occasion because "he was angry that she had been talking to a former boyfriend." *Id.* at 366, 369. The court explained that "[t]he Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit." *Id.* at 370-71.

Other courts have relied on similarly broad forfeiture theories to admit a wide variety of statements of alleged homicide victims. See, *e.g.*, *State* v. *Mason*, 162 P.3d 396, 401-05 (Wash. 2007); *State* v. *Jensen*, 727 N.W.2d 518, 527-35 (Wis. 2007); *People* v. *Bauder*, 712 N.W.2d 506, 511-15 (Mich. Ct. App. 2005). Some courts have relied on forfeiture to admit more traditional dying declarations. See *State* v. *Meeks*, 88 P.3d 789, 792-95 (Kan. 2004), overruled in part on other grounds by *State* v. *Davis*, 158 P.3d 317, 322 (Kan. 2006); *United States* v. *Mayhew*, 380 F. Supp. 2d 961, 963-69 (S.D. Ohio 2005); *Gonzales* v. *State*, 155 S.W.3d 603, 605-06, 609-11 (Tex. App. 2004), aff'd on other grounds, 195 S.W.3d 114, 125 (Tex. Crim. App. 2006). But even those courts, by discarding the traditional rationale for admitting such statements, invite further expansion of the forfeiture rule.

2. If this Court affirms the decision below, moreover, prosecutors will attempt to extend California's rule beyond homicide cases. Although the witness in this case was dead, forfeiture historically was not limited to dead witnesses. See pp. 6-12, *supra*. Prosecutors would seek to introduce *ex parte* statements in cases involving other types of unavailability caused by the defendant.

Courts have recognized broad theories of unavailability. For example, some courts have deemed witnesses "unavailable" where the witness claimed to be psychologically or emotionally unable to testify. See, *e.g.*, *People* v. *Stechly*, 870 N.E.2d 333, 373 (Ill. 2007) ("[U]navailability includes those child witnesses who are unable to testify because of fear."); Carter & Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, Champion, Sept.-Oct. 2004, at 21, 22 (defendant's mere presence in the courtroom can render a witness "emotionally unavailable"). California law expressly allows courts to treat certain witnesses as "medically unavailable" if "testimony would cause the[m] emotional trauma." Cal. Penal Code § 1346(d); see also Colo. Rev. Stat. § 18-3-413(3).

Since *Crawford*, prosecutors have routinely attempted to combine those broad concepts of unavailability with broad notions of forfeiture. They argue that defendants forfeit their confrontation rights whenever the offense for which they are being prosecuted rendered the witness psychologically unavailable to testify—or, indeed, even *available* to testify but at the cost of further psychological trauma. In *People* v. *Moreno*, 160 P.3d 242 (Colo. 2007), for example, a trial court found an alleged child abuse victim unavailable because testifying would cause her to be "retraumatized"; "she could suffer enhanced anxiety, fear, and humiliation; and the 'trauma bond' between her and the defendant could be renewed." *Id.* at 247. The State proffered her earlier *ex parte* testimony,

arguing that the defendant had "forfeited" his confrontation rights because his alleged acts of child abuse were responsible for the witness's trauma. *Id.* at 246. The Colorado Supreme Court rejected that argument only because it held, contrary to the California Supreme Court below, that intent to prevent a witness from testifying was required for forfeiture to apply. *Id.* at 247; see also *Stechly*, 870 N.E.2d at 340-41, 348-54; *State* v. *Henderson*, 160 P.3d 776, 793 (Kan. 2007).

Commentators have likewise taken up the charge. One author argues that forfeiture should apply in domestic-violence cases, even in the absence of a specific threat to the witness not to testify, so long as the State shows the "existence of a battering relationship built on power and control dynamics." King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 Creighton L. Rev. 441, 444, 463 (2006). Another author similarly argues: "Whether the reason is fear of retaliation, physical terror of seeing the abuser, or a desire to please and remain with the abuser, the cause of a victim's unavailability is the same—procurement by the abuser through the abuse itself." Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to Crawford in Domestic Violence Cases*, Prosecutor, Nov.-Dec. 2004, at 14, 16.

Unavailable witnesses are a routine feature of domestic-violence and child-abuse cases. "[E]ighty to ninety percent of domestic violence victims who appeal to the criminal justice system for help recant or otherwise fail to assist the prosecution at some point in the proceedings." *State* v. *Mechling*, 633 S.E.2d 311, 324 (W. Va. 2006). Child abuse prosecutions encounter similar issues. See Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 374-77 (2005). Before *Crawford*, prosecutors relied on *Roberts* to avoid

having to produce those alleged victims in court. See Huff, *Confronting* Crawford, 85 Neb. L. Rev. 417, 435-36 (2006). This Court should not allow an expansive and historically baseless forfeiture doctrine to become prosecutors' new tool of choice for evading confrontation rights.

B. The California Supreme Court's Rule Would Undermine the Fairness of Criminal Trials

Broad application of forfeiture would damage the fairness of criminal trials. Confrontation is not a mere procedural formality. As the Framers well knew, accusations of criminal conduct are not always true. The Confrontation Clause reflects the Framers' judgment that the crucible of cross-examination is the best—and only acceptable—method of ascertaining the truth. As any defense lawyer will attest, cross-examination is no less important to discovering the truth today. Compare, *e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 373-74 (1768) (cross-examination will "sift out the truth much better"), with Gerry Spence, *Win Your Case: How To Present, Persuade, and Prevail—Every Place, Every Time* 168-222 (2005) (cross-examination is "the one best pry to disgorge the whole truth").

The forfeiture doctrine allows convictions based on precisely the sort of evidence the Confrontation Clause was designed to guard against: untested—and thus presumptively unreliable—*ex parte* testimony. Here, for example, the State presented Ms. Avie's *ex parte* accusations of an earlier assault to prove that Mr. Giles murdered her. Mr. Giles had no opportunity to cross-examine Ms. Avie to show that her accusations were incomplete, misleading, or false; that she was biased or had some ulterior motive; or that her answers were the product of slanted questioning by overzealous police officers. Cf. 3 Blackstone, *supra*, at 373-74.

The state court thought that result "equitable" because Mr. Giles had murdered Ms. Avie. Of course, as in most cases, that fact was disputed. Ms. Avie's *ex parte* testimony was allowed, not because we *know* Mr. Giles murdered her, but because a panel of state judges made a finding to that effect. That is no small difference. The Framers secured the right to a common-law criminal trial "by witness and jury" (2 How. St. Tr. at 15-16) precisely because judges can make mistakes (and typically not in favor of defendants accused of heinous crimes). The Framers allowed narrow exceptions, long recognized at common law, for dying declarations or witness-tampering. The State's pleas of "equity" notwithstanding, this Court should go no further.

CONCLUSION

The decision of the California Supreme Court should be reversed.

Respectfully submitted.

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